Supreme Court of the United States

OCTOBER TERM, 1950.

No. 320.

JOHN J. WINBERRY,

Petitioner,

vs.

W. BURTON SALISBURY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

This petition for certiorari seeks to review the judgment of the Supreme Court of New Jersey affirming a judgment of the Superior Court of New Jersey, Appellate Division, which dismissed an appeal taken by petitioner from a judgment of the trial court (Superior Court of New Jersey, Law Division, Middlesex County) on the ground that the appeal to the Superior Court of New Jersey Appellate Division had not been taken within time.

On February 18, 1949, the petitioner herein filed a complaint in a civil action (R. 1) in the Superior Court of New Jersey, Law Division, Middlesex County (hereinafter called the trial court), demanding that a presentment (R. 2–15),

filed by the Middlesex County Grand Jury be expunged from the files of the County Clerk of Middlesex County, New Jersey.

A motion for summary judgment addressed to the complaint was made by respondent herein upon the ground, inter alia, that the complaint did not state a cause of action on which petitioner herein was entitled to any relief. The petitioner made a cross motion for a summary judgment in his favor. The motion of respondent was granted and that of the petitioner denied. On May 25, 1949, the trial court ordered that summary judgment be entered for respondent herein and against the petitioner and dismissed the complaint (R. 16).

On June 14, 1949, an order was entered by the trial court that the aforesaid summary judgment should be without costs. This order was entered upon the grounds that the summary judgment of May 25, 1949, by inadvertance, had failed to provide that it should be without costs. It was entered by consent of all parties and such consent was endorsed thereon (R. 16–17).

On July 26, 1949, a notice of appeal to the Superior Court of New Jersey, Appellate Division, was served by petitioner and acknowledged by the attorney for respondent herein (R. 17). The acknowledgment of service specifically stated that it was without prejudice to the claim that the same was out of time (R. 17).

The notice of appeal was served sixty-one days after entry of the summary judgment and forty-one days after entry of the consent order that the summary judgment should be without costs. The rules governing the courts of the State of New Jersey provide that an appeal from the Superior Court in civil causes must be taken to the appropriate appellate court within forty-five days after entry of the judgment appealed from. The pertinent part of the Supreme Court rule applicable reads as follows:

> "R. 1:2–5. Time of Appeal.
>
> "Where an appeal is permitted, it shall be taken to the appropriate appellate court within the following periods of time after the entry of the judgment, order or determination appealed from:
>
> "(b) Final judgments of the county courts, or trial divisions of the Superior Court, in civil causes, forty-five days, and in criminal causes, six months, unless a shorter time is provided by law."

The above quoted rule is made applicable to appeals to the Appellate Division of the Superior Court of New Jersey by Rule 4:2–5 which reads as follows:

> "Where an appeal is permitted to this court, it shall be taken within the appropriate time provided for in Rule 1:2–5."

A motion was made to dismiss the appeal taken to the Superior Court of New Jersey, Appellate Division, from the judgment of the trial court upon the grounds that the same was not taken within the time required (R. 17). This motion was argued before the Appellate Division of the Superior Court of New Jersey on August 23, 1949, and on September 14, 1949, the said Appellate Division in its opinion dismissed the appeal upon the ground that it was not taken within time (R. 18–21). Judgment was entered dismissing said appeal (R. 21). An appeal from this judgment of the Appellate Division dismissing the appeal was taken to the Supreme Court of New Jersey (R. 21–22). On June 27, 1950, the Supreme Court in its opinion affirmed the judgment of the Appellate Division of the Superior Court which dismissed the appeal from the judgment of the trial court (R. 23–46). Mandate on affirmance in the Supreme Court was filed June 27, 1950 (R. 47).

The only question presented to the Appellate Division of the Superior Court and to the Supreme Court of New Jersey

on both appeals was whether the appeal from the judgment of the trial court to the Appellate Division was taken within time. The respondent herein claimed that the rule previously quoted required an appeal from the trial court to be taken to the Appellate Division of the Superior Court of New Jersey within forty-five days from the time of the entry of the judgment.

The petitioner herein resisted the motion upon the grounds that he had taken his appeal within the time required by the rules, and in any event, the petitioner claimed that the statute (R. S. 2:27–356) gave him a year within which to take an appeal. The pertinent part of this statute provides as follows:

> "R. S. 2:27–356. No appeal shall be taken in any case unless the same shall be taken within one year after judgment rendered, * * *."

The question then arose whether the summary judgment entered on May 25, 1949, was the final judgment from which appeal had to be taken or whether the order entered June 14, 1949, providing that the judgment should be without costs was the final judgment from which appeal could be taken. It was decided by the Appellate Division of the Superior Court (R. 18–21) and also the Supreme Court of New Jersey (R. 23–46) that the summary judgment entered May 25, 1949, was the final judgment from which the appeal must be taken.

The question then arose whether the time within which to take an appeal specified in the rule previously quoted was applicable or whether the time specified in the statute previously quoted applied. The Appellate Division of the Superior Court (R. 18–21) and the Supreme Court of New Jersey (R. 23–46) held that the rule of the Court superseded the statute in question under the provisions of Article VI, Section 2, paragraph 3 of the Constitution of 1947 of New

Jersey. The sole question argued and involved in the appeal to the Appellate Division of the Superior Court and the further appeal to the Supreme Court of New Jersey was as to the construction of the rule and the statute and whether the rule superseded the statute. No Federal question was raised or argued in either the Appellate Division of the Superior Court or the Supreme Court of New Jersey. A mere question of construction under the Constitution of 1947 of the State of New Jersey was the only question presented.

This petition for a writ of certiorari herein is directed to a review of the judgment of the Supreme Court of New Jersey affirming the judgment of the Appellate Division of the Superior Court of New Jersey dismissing the appeal from the judgment of the trial court. Federal questions are raised for the first time in this proceeding.

Questions Presented.

1. Whether this Court has jurisdiction in the premises.
2. Whether Federal questions may be raised for the first time upon a petition for a writ of certiorari to the United States Supreme Court.
3. Whether a writ of certiorari should issue.

Reasons for Denying the Writ.

The basis for this petition for writ of certiorari is that the Supreme Court of New Jersey erred in affirming the judgment of the Appellate Division of the Superior Court of New Jersey which dismissed an appeal from a final judgment of the trial court upon the ground that the appeal was not taken within time. The writ should be denied upon the following grounds:

1. This court is without jurisdiction because no Federal question was raised in the State courts. The petitioner claims that he was denied due process of law and was deprived of his right to appeal given him by the State Constitution, and further, that Article IV, Section IV of the United States Constitution, which guarantees to every State a republican form of government, has been violated. These claims which the petitioner now makes were not raised in the courts of New Jersey, nor did the State Court pass upon them. The first time any Federal question has been raised is on this petition in this Court, and consequently, jurisdiction of this Court is lacking under 28 U. S. C. A. 1257.

2. No Federal question actually is involved herein. The petitioner failed to take his appeal within the time limited and now seeks to avoid the result of such failure by claiming he was denied due process of law and deprived of his right to appeal and that the republican form of government has been denied to New Jersey. The right to appeal is a procedural matter and may only be perfected by taking the steps necessary. The failure to do so constitutes a waiver of his right to appeal and does not constitute a deprivation of any vested right. The contention that Article IV, Section IV of the United States Constitution was violated is a political and not a judicial question.

ARGUMENT.

POINT I.

The petition should be denied because of lack of jurisdiction in this Court.

The issue in this case is limited to the question of the dismissal of the appeal in the Appellate Division of the Superior Court of New Jersey upon procedural grounds, to wit, that it was not taken within time. Any Federal question

for jurisdictional purposes in this Court would be raised only in the Appellate Division of the Superior Court or in the Supreme Court of New Jersey. Any Federal question raised by the complaint in the trial court with respect to the merits of the complaint would not be the proper subject for argument before the appellate courts on a motion to dismiss an appeal as not being taken within the time required. Consequently, the Federal questions raised in the complaint filed in the trial court are not before this Court on this petition and may not be made the basis for jurisdictional purposes in this Court.

The petitioner, under 28 U. S. C. A. 1257, is required to raise the Federal question in one or both of the Appellate Courts of the State of New Jersey.

House vs. *Road Improvement Dist. &c,* 266 U. S. 175, 45 S. Ct. 60.
Waters-Pierce Oil Co. vs. *Texas,* 212 U. S. 86, 29 S. Ct. 220.
Adams vs. *Russell,* 229 U. S. 353, 33 S. Ct. 846.
Murdock vs. *Memphis,* 20 Wall. 590, 22 L. ed. 429.
Levy vs. *San Francisco Superior Ct.,* 167 U. S. 175, 17 S. Ct. 769.
Scudder vs. *New York,* 175 U. S. 32, 20 S. Ct. 26.
People of New York ex rel. Rosevale Realty Co. vs. *Kleinert,* 268 U. S. 646, 45 S. Ct. 618.
Montana vs. *Rice,* 204 U. S. 291, 27 S. Ct. 281.
Missouri Pac. R. Co. vs. *Taber,* 244 U. S. 200, 37 S. Ct. 522.

A Federal question for jurisdictional purposes is not raised in time when it is raised for the first time upon a petition for a writ of certiorari in this Court.

Rogers vs. *Clark Iron Co.,* 217 U. S. 589, 30 S. Ct. 693.
Mallers vs. *Commercial Loan Co.,* 216 U. S. 613, 30 S. Ct. 438.
Meyer vs. *Richmond,* 172 U. S. 82, 19 S. Ct. 106.

Johnson vs. *N. Y. Life Ins. Co.,* 187 U. S. 491, 23 S. Ct. 194.

Telluride Power Transmission Co. vs. *Rio Grande Western R. Co.,* 187 U. S. 569, 23 S. Ct. 178.

It is necessary that the Federal question relied upon to confer jurisdiction in this Court be presented for decision at some time during the proceedings before the State Courts. *Murdock* vs. *Memphis,* 20 Wall. 590, 22 L. ed. 429; *Mutual Life Ins.* vs. *McGrew,* 188 U. S. 291, 23 S. Ct. 375; *Sayward* vs. *Denny,* 158 U. S. 180, 15 S. Ct. 777.

The proceedings out of which this petition for a writ of certiorari arises had its first inception in the motion to dismiss an appeal taken by petitioner from a final judgment of the trial court to the Appellate Division of the Superior Court of New Jersey upon the grounds that the appeal was not taken within the time required. There was no Federal question raised at that time. The entire argument was based upon construction of the New Jersey Constitution, Rules of Court and the statute quoted. The Opinion in the Appellate Division on the motion to dismiss the appeal (R. 18–21) was grounded upon the fact that the rule (R. 1:2–5(b); 4:2–5) of the court providing the time within which to take an appeal superseded the prior statute (R. S. 2:27–356). Nor did the petitioner raise any Federal question when he appealed to the Supreme Court of New Jersey from the judgment of the Appellate Division dismissing his appeal from the trial court as not being taken in time. In order to confer jurisdiction upon this Court, it is essential that the petitioner have raised a Federal question in the State Courts and that the State Court must have passed upon the Federal question in its decision.

An examination of the opinion of the Appellate Division (R. 18–21) and the opinion of the Supreme Court (R. 23–46) shows that no Federal question was raised or passed upon by either of the Appellate Courts of the State of New Jersey.

Cleveland, etc., R. Co. vs. *Cleveland,* 235 U. S. 50, 35 S. Ct. 21.
Speed vs. *McCarthy,* 181 U. S. 269, 21 S. Ct. 613.
Sweringer vs. *City of St. Louis,* 185 U. S. 38, 22 S. Ct. 569.
Fowler vs. *Lamson,* 164 U. S. 252, 17 S. Ct. 112.
Honeyman vs. *Hanan,* 300 U. S. 14, 57 S. Ct. 350.
Northwestern Bell Telephone Co. vs. *Nebraska State Ry. Commission,* 297 U. S. 471, 56 S. Ct. 536.
Montgomery vs. *Hernandez,* 12 Wheat. 129, 6 L. ed. 575.
Crowell vs. *Randell,* 10 Pet. 368, 9 L. ed. 458.
Detroit City R. Co. vs. *Guthard,* 114 U. S. 133, 5 S. Ct. 811.
Israel vs. *Arthur,* 152 U. S. 355, 14 S. Ct. 583.

The Federal questions now raised on this petition were neither presented to nor formed a part of the decisions of the State Court and accordingly this Court does not have jurisdiction to grant the writ.

POINT II.

Federal questions may not be raised for the first time in a petition for a writ of certiorari to this Court.

One of the jurisdictional requirements on a petition for writ of certiorari to this Court is that the Federal questions raised in such petition must have been first presented to the State Court and decided by such court.

Murdock vs. *Memphis,* 20 Wall. 590, 22 L. Ed. 429;
Mutual Life Ins. vs. *McGrew,* 188 U. S. 291, 23 S. Ct. 375;
Rogers vs. *Clark Iron Co.,* 217 U. S. 589, 30 S. Ct. 693;
Johnson vs. *N. Y. Life Ins. Co.,* 187 U. S. 491, 23 S. Ct. 194.

The Federal questions set forth in the petition for writ of certiorari herein were not presented to the Appellate Courts of the State of New Jersey, which were the only courts in which Federal issues could have been raised, and as a result, the petitioner has not complied with the jurisdictional requirements for the granting of a writ of certiorari by this Court.

POINT III.

A writ of certiorari should not issue in this case.

The petitioner has not been denied his right of appeal by the action of the State courts. The petitioner failed to exercise his right of appeal. He failed to file his notice of appeal within the time required by the rules of court (R. 1:2–5(b); 4:2–5). The right to appeal may be a substantive right, but the time within which an appeal may be taken is purely a question of procedure, and there is no vested right in a mode of procedure. *Backus* vs. *Fort St. Union Depot Co.*, 169 U. S. 557, 18 S. Ct. 445. Nor is the right of appeal essential to due process of law under the United States Constitution.

Reetz vs. *Michigan*, 188 U. S. 505, 23 S. Ct. 390;
District of Columbia vs. *Clawans*, 300 U. S. 617, 57 S. Ct. 660;
Lott vs. *Pitman*, 243 U. S. 588, 37 S. Ct. 473;
Luckenbach S. S. Co. vs. *United States*, 272 U. S. 533, 47 S. Ct. 186;
Baltimore & Potomac R. R. Co. vs. *Grant*, 98 U. S. 398, 25 L. Ed. 231.

A decision of a State Court resting on grounds of State procedure does not present a Federal question. Matters affecting the remedy are governed by the law of the forum.

Although the petitioner's claim, that he was uncertain as to the proper procedure for him to follow in perfecting his appeal, may be a ground upon which he could petition the State Court for another chance, it is not a ground for jurisdiction in this Court as a denial of constitutional rights. *Market St. Ry. Co.* vs. *Railroad Commission of State of Cal.*, 324 U. S. 548, 65 S. Ct. 770; *Central Vermont R. Co.* vs. *White*, 238 U. S. 507, 35 S. Ct. 865; *French* vs. *Hopkins*, 124 U. S. 524, 8 S. Ct. 589; *Seneca Nation* vs. *Christy*, 162 U. S. 283, 16 S. Ct. 828.

The only question for determination in the Appellate Courts of New Jersey was whether the Rules of Court (R. 1:2–5(b); 4:2–5) respecting time to appeal superseded the statute (R. S. 2:27–356). This was purely a question of construction under the Constitution of 1947 of New Jersey and as a result does not involve a Federal issue. *Grand Gulf R., etc. Co.* vs. *Marshall*, 12 How. 165, 13 L. Ed. 938; *Snell* vs. *Chicago*, 152 U. S. 191, 14 S. Ct. 489; *Ferry* vs. *King County*, 141 U. S. 668; 12 S. Ct. 128.

Petitioner claims that the Rule of Court (R. 1:2–5) was never construed (Petition pages 2–3). As a matter of fact, the applicability of this rule specifying the time within which appeals must be taken was passed upon by the Supreme Court of New Jersey six months before the petitioner herein took his first appeal to the Appellate Division of the Superior Court. *In the Matter of the Estate of Horton*, 1 N. J. 571, 65 Atl. (2) 60 (Decided Jan. 24, 1949), Petition for writ of certiorari to U. S. Supreme Court denied June 20, 1949; in *Gay* vs. *Fidelity Union Trust Co.*, 337 U. S. 945, 69 S. Ct. 1502; Rehearing denied 338 U. S. 842, 70 S. Ct. 30; a notice of appeal from a judgment entered October 13, 1948, was filed December 3, 1948. A motion was made to dismiss the appeal on the ground that it was not taken within time. The Supreme Court of New Jersey held that Rule 1:2–5 required the appeal to be taken within 45

days after the entry of the judgment appealed from and dismissed the appeal.

This case decided that the Rules of Court were applicable to appeals and as a result there is no substantial basis for the contention of petitioner that he was denied due process because he did not know the appeal should have been taken within 45 days of the entry of judgment. It is also interesting to note in this regard that his notice of appeal in the instant case was served and filed within 45 days of the entry of the order directing that the judgment should be without costs. This is no mere coincidence but appears rather to refute the contention that he was not aware he should have appealed within 45 days.

The contention made by petitioner that the proceedings violate Article IV, Section 4 of the Federal Constitution which guarantees to every State a republican form of government was not raised before the State Court. As a matter of fact, the enforcement of the constitutional guarantee of a republican form of government is for Congress and not the Courts. *Highland Farms Dairy* vs. *Agnew*, 300 U. S. 608, 57 S. Ct. 549; *Mountain Timber Co.* vs. *Washington*, 243 U. S. 219, 37 S. Ct. 260. Questions arising under this constitutional provision are political and not judicial in character and are for the consideration of Congress and not the Courts. *State of Ohio ex rel. Bryant* vs. *Akron Metropolitan Park District*, 281 U. S. 74, 50 S. Ct. 228.

The petitioner appears to contend that Article VI, Section 2, paragraph 3 of the Constitution of 1947 of New Jersey, which provides "The Supreme Court shall make rules governing the administration of all courts in the State and, subject to law, the practice and procedure in all such courts. * * *", so distributes the powers of government that it denies to the State of New Jersey a republican form of government. As a matter of fact, it merely places in the Judicial branch of the State Government powers which are

properly part of that branch. The distribution of power by a State among its governmental organs is commonly, if not always, a question for the State. *Highland Farms Dairy* vs. *Agnew*, 300 U. S. 608, 57 S. Ct. 549.

The respondent contends that there is no substance to the questions raised in the petition herein and that he has not been denied due process of law, he has not been denied his right to appeal, nor has the State of New Jersey been denied a republican form of government as claimed in his petition.

Conclusion.

The petition for writ of certiorari should be denied.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General of New Jersey,

WARREN DIXON, JR.,
Deputy Attorney General of New Jersey,

JOSEPH A. MURPHY,
Assistant Deputy Attorney General of New Jersey,
Counsel for Respondent.